

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 147 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE A.N.DIVECHA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes
2. To be referred to the Reporter or not? Yes

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3. Whether Their Lordships wish to see the fair copy of the judgement? No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No
5. Whether it is to be circulated to the Civil Judge?

No

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PURSHOTTAM K BHAVAIYA

Versus

STATE OF GUJARAT

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Appearance:

Shri K.B. Anandjiwala, Advocate, for the  
Appellant (appointed)

Shri M.B. Bukhari, Additional Public Prosecutor,  
for the Respondent-State

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CORAM : MR.JUSTICE A.N.DIVECHA

Date of decision: 10/10/96

ORAL JUDGEMENT

The judgment and order of conviction passed by the learned Additional Sessions Judge of Kheda at Nadiad on 31st December 1986 in Sessions Case No. 132 of 1986 is under challenge in this appeal under sec. 374 of the

Code of Criminal Procedure 1973 (the Cr.P.C. for brief). Thereby the learned trial Judge convicted the appellant-accused of the offence punishable under sec. 307 of the Indian Penal Code, 1860 (the IPC for brief) and sentenced him to rigorous imprisonment for 3 years and fine of Rs. 200 in default rigorous imprisonment for one month.

2. The facts giving rise to this appeal move in a narrow compass. One lady, named, Shardaben, wife of the appellant-accused, was carried to Civil Hospital at Kheda in a burnt condition on 17th February 1986. Since it was a medico-legal case, the Medical Officer informed the police of it. Thereupon her complaint was recorded by the police. It is at Ex. 29 on the record of the trial. The Medical Officer examined as prosecution witness No. 3 at Ex. 10 on the record of the trial gave treatment to her. He had found her condition to be somewhat serious. Thereupon her dying declaration was recorded by the Executive Magistrate. It is at Ex. 9 on the record of the trial. It is proved by the evidence of prosecution witness No.2 at Ex. 7 on the record of the trial. He recorded the dying declaration at Ex. 9. It appears that after treatment she recovered and she was discharged about 30 days later on 19th March 1986 as transpiring from the evidence of the concerned medical officer at Ex. 10 on the record of the trial. It appears that nearly a month later she breathed her last on 27th April 1986. Her post-mortem was conducted by Dr. N.B. Bhatt examined as prosecution witness No. 4 at Ex. 30. According to him, she died of shock and dehydration. In the course of investigation the investigating officer recorded statements of witnesses and also drew several panchnamas including the inquest panchnama. The investigating officer has been examined as prosecution witness No.12 at Ex. 28 on the record of the trial. On completion of the investigation, the charge-sheet was submitted in the Court of the Judicial Magistrate (First Class) at Mehmedabad on 10th April 1986 charging the appellant-accused with the offences punishable under sections 307, 323 and 504 of the IPC. Since the offence under section 307 of the IPC is triable by the court of sessions, the learned trial Magistrate, by his order passed on 9th April 1986, committed the case to the Sessions Court of Kheda at Nadiad for trial. It came to be registered as Sessions Case No. 132 of 1986. It appears to have been assigned to the learned Additional Sessions judge for trial and disposal. The charge against the respondent-accused came to be framed on 28th October 1986. Since in the meantime the lady had died on 27th April 1986 during the course of investigation, the

respondent-accused was charged with the offence punishable under sec. 302 and 323 of the IPC. The charge is at Ex. 2 on the record of the trial. The respondent-accused did not plead guilty to the charge. He was thereupon tried. After recording the prosecution evidence and after recording the further statement of the respondent-accused under sec. 313 of the Cr.P.C. and after hearing the arguments, by his judgment and order passed on 31st December 1986 in Sessions Case No. 132 of 1986, the learned Additional Sessions Judge convicted the respondent-accused of the offence punishable under sec. 307 of the IPC and sentenced him to rigorous imprisonment for 3 years and fine of Rs. 200 in default rigorous imprisonment for one month. That aggrieved the accused. He has therefore invoked the appellate jurisdiction of this Court under sec. 374 of the Cr.P.C. for questioning the correctness of his conviction and sentence by the learned trial Judge.

3. Since the appeal was filed from jail and since the appellant-accused could not engage an advocate, this Court appointed learned Advocate Shri K.B. Anandjiwala to represent the appellant-accused for the purpose of this appeal.

4. Learned Advocate Shri Anandjiwala has taken me through the entire evidence on record in support of his submission that the impugned judgment and order of conviction and sentence cannot be sustained in law. It has been urged by learned Advocate Shri Anandjiwala for the appellant-accused that the prosecution could not be said to have brought the guilt home to the accused beyond any reasonable doubt and the appellant-accused is entitled to acquittal by giving him benefit of doubt. As against this, learned Additional Public Prosecutor Shri Bukhari for the respondent-State has submitted that the learned trial Judge has carefully scanned and scrutinized the evidence on record and has recorded the finding of guilt against the respondent-accused by giving elaborate reasoning for his conclusion, and as such the judgment and order of conviction passed by the learned trial Judge calls for no interference by this Court in this appeal.

5. As rightly submitted by learned Advocate Shri Anandjiwala for the appellant-accused, the so-called dying declaration cannot and need not be used as such if the maker thereof has survived and has died not on account of injuries sustained by her with respect to the incident in question. It transpires from the material on record that the learned trial Judge has used the dying declaration of the victim as the sole basis for

conviction of the appellant-accused. It transpires from the oral testimony of the medical officer at Ex.10 on the record of the trial that he treated the deceased when she was brought to hospital in a burnt condition on 17th February 1986 and she was discharged on 19th March 1986 in a fully recovered condition. She is reported to have breathed her last on 27th April 1986. The medical officer conducting her post-mortem was examined at Ex. 13 on the record of the trial. According to him, her death was due to shock and dehydration and in his cross-examination he has clarified that dehydration in a patient may occur on account of excessive vomits and motions resulting in loss of water from the body which might cause the death of the patient. In view of this evidence on record, her death cannot be attributed solely to injuries sustained by her on account of the burning incident. It is possible that she died her natural death on account of dehydration resulting from excessive vomits and motions. In that view of the matter, her so-called dying declaration recorded by the Executive Magistrate cannot be used as the dying declaration as her death was not caused solely on account of the injuries received by her in the burning incident.

5. I am fortified in my view by the binding ruling of the Supreme Court in the case of Moti Singh and another v. The State of Uttar Pradesh reported in AIR 1964 SC 900. It has been held therein:

Clause (1) of S. 32 makes a statement of a person who has died relevant only when that statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. When the deceased is not proved to have died as a result of injuries received by him in the incident where the deceased is alleged to have been killed his statement relating to that incident cannot be said to be the statement as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death.

The aforesaid ruling of the Apex Court is binding to this Court. It is applicable in the present case. As pointed out hereinabove, the death of the deceased could not be attributed solely to the injuries received by her in the incident of burning. The so-called dying declaration recorded by the Executive Magistrate cannot therefore be used as her dying declaration within the meaning of sec.

32(1) of the Indian Evidence Act, 1872 (the Act for brief) in view of the aforesaid binding ruling of the Supreme Court.

6. To the same effect is the Division Bench ruling of this Court in the case of State of Gujarat v. Madha Bhana reported in 1984(2) 25(2) G.L.R. 900. It has been held therein:

Under sec. 32(1) of the Evidence Act, statements, written or verbal, of relevant facts made by a person who is dead are relevant when the statement is made by a person as to cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of death comes into question. The medical evidence clearly shows that Baliben did not die on account of injuries inflicted on her. Hence the statements made by Baliben to her daughter, neighbours, the Medical Officer and the Executive Magistrate as regards the incident of infliction of knife blows to her cannot be said to be statements as to the case of her death.

7. Sitting as a single Judge, the aforesaid Division Bench ruling of this Court is binding to me. Even otherwise, I am in respectful agreement therewith. The view taken by this Court in its aforesaid Division Bench ruling is in consonance with the aforesaid ruling of the Supreme Court.

8. In view of the aforesaid binding rulings of the Supreme Court and the Division Bench of this Court, the so-called dying declaration of the deceased recorded by the Executive Magistrate cannot be used as the dying declaration within the meaning of sec. 32(1) of the Act. It can at the most be used as her previous statement under sec. 157 thereof.

9. The same would be applicable to her complaint at Ex. 29 on the record of the case. It could have been used as her dying declaration if she had died on account of the injuries sustained by her in the incident of burning. Since her death is not attributable to such injuries, her complaint at Ex. 29 has also to be treated as her previous statement under sec. 157 of the Act.

10. As provided in sec. 157 of the Act, the previous statement can be used only for the purpose of corroborating or contradicting a witness. The previous

statement of a person can be used only as a piece of corroborative evidence and not as a piece of substantive evidence. The complaint at Ex. 29 also cannot be used as a piece of substantive evidence according to well-settled principles of law in that regard.

11. In this connection, a reference deserves to be made to the binding ruling of the Supreme Court in the case of *The State of Bombay v. Rusy Mistry and another* reported in AIR 1960 SC 391. It has been held therein:

The first information report is the information recorded under S. 154. It is an information given to a police officer relating to the commission of an offence. It is also an information given by an informant on which the investigation is commenced. It must be distinguished from information received after the commencement of the investigation which is covered by Ss. 161 and 162. The first information report is not substantive evidence, but can only be used to corroborate or contradict the evidence of the information given in court or to impeach his credit. It follows that a judge cannot place such a report before the jury as substantive evidence, but can only refer to that portion of it which had been used for one or other of the aforesaid purposes. Where a document is not a first information report, not being the first complaint by the informant made to the police, it is hit by Ss. 161 and 162, and the Judge should not have relied upon it except to the extent permitted by the proviso to S. 162, i.e. to contradict the informant with reference to any particular statement therein.

The aforesaid ruling of the Supreme Court is binding to this Court. It is applicable in the present case. The complaint of the deceased was obviously the first information report for the purposes of sec. 154 of the Cr.P.C. It cannot be used as a piece of substantive evidence.

12. In this connection, a reference also deserves to be made to the Division Bench ruling of the Orissa High Court in the case of *State of Orissa v. Chakradhar Behera and others* reported in 1964 Orissa 262. In that case the complainant died his natural death after giving the first information report of the incident within the meaning of sec. 154 of the Cr.P.C. In that context it has been held:

First information report is not a substantive piece of evidence. It can be used either for corroboration under sec. 157, or for contradiction under sec. 145 of the Evidence Act, of the maker of the statement. Where the informer has died a natural death long after the occurrence but prior to the initiation of the commitment proceeding, FIR cannot be used either for corroboration or for contradiction of the maker who is dead. Further, as the statement in F.I.R. did not relate to the cause of the informer's death, or to any of the circumstances of the transaction which resulted in his death and as the cause of his death did not come into question in the trial, the F.I.R. was not admissible under sec. 32(I), Evidence Act, as a substantive piece of evidence.

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Moreover, if the person making the statement is dead, then he is not in a position to make any statement in court and there would be no opportunity to test the consistency of the conduct evidenced by the complaint in relation to the one which could have been given in the witnesses box. In such circumstances there is nothing to confirm or corroborate the statement of the complainant and the statement cannot be proved. Section 8 would not render it admissible. This conclusion is reached not because of the non-applicability of S. 8 but because of the difficulty for testing the consistency when the maker of the statement is dead.

I am in respectful agreement with the aforesaid Division Bench ruling of the High Court of Orissa. It is on all fours applicable in the present case. No conviction can be based on the basis of only the first information report, that is, the complaint at Ex. 29 in this case, though it could have been treated as the dying declaration if the maker thereof had died on account of injuries sustained as a result of the incident referred to therein. Since it was not so in the present case, the complaint at Ex. 29 cannot be used as a piece of substantive evidence.

13. It transpires from the evidence on record that no prosecution witness has supported the prosecution case at trial. The prosecution witnesses examined at trial

include a brother of the deceased at Ex. 5 and her son at Ex. 17. Neither her brother nor her son has supported the prosecution case at trial. Both were declared hostile but no material information could be elicited from their cross-examination except contradictions qua their respective police statements. There is no evidence worth the name showing the presence of the appellant-accused in the house at the relevant time. In that view of the matter, it is difficult to connect him with the alleged crime stated to have been committed by him at the relevant time.

14. The circumstantial evidence in this case is very weak. The main circumstance about the presence of the appellant-accused in the house at the relevant time is not established. In its absence, the link is not complete. It is a settled principle of law that conviction on the basis of circumstantial evidence can be made provided all circumstances pointing the finger of guilt to the accused are fully established and the chain of the circumstances is complete leading to the only conclusion that none but the accused committed the crime. As pointed out hereinabove, the main circumstance as to the presence of the appellant-accused in the house at the relevant time is not established. In that view of the matter, the appellant-accused could not have been convicted on the basis of any circumstantial evidence.

15. Since the learned trial Judge has convicted the appellant-accused only on the basis of the so-called dying declarations and since the position of law is quite clear in that regard that the so-called dying declarations would pale into insignificance as such and have to be treated only as previous statements, the conviction of the appellant-accused cannot be sustained in law. The impugned judgment and order of conviction and sentence passed by the learned trial Judge will have therefore to be quashed and set aside.

16. In the result, this appeal is accepted. The judgment and order passed by the learned Additional Sessions judge of Kheda at Nadiad on 31st December 1986 in Sessions Case No. 132 of 1986 is quashed and set aside. The appellant-accused is acquitted of the charge levelled against him. His bail bonds are cancelled.

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